Supreme Court, U.S.
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No. 88-1227

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

STEPHEN J. RUSSO,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SANTA CLARA,
Respondent.

BEAR, STEARNS & CO., INC. and MICHAEL J. DOHERTY, JR.; BANK OF THE WEST; PAUL A. WEHNER; ERNEST DE LA OSSA; KMG MAIN HURDMAN; MARILEE LAU; FREDERIC D. WINSLOW; ROBERT W. VICKREY; ROBERT E. NILSSEN; SECURITY PACIFIC NATIONAL BANK; KOUNS, MARSHALL, QUINLIVAN & SEVERSON; PAUL M. KOUNS; DOUGLAS E. MARSHALL; MICHAEL QUINLIVAN; LAWRENCE L. SEVERSON; ROBERT D. CAMPBELL; WILLIAM F. GATES; RIDGE L. HARLAN; RICHARD G. LANDIS; and WILLIAM E. MCKENNA,
Real Parties in Interest,

PAUL C. KNAUFF,
Additional Real Party in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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I

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Supreme Court has jurisdiction to decide an issue of a state court's interpretation and application of state case law and state statute regarding determination of good faith settlements in a state court action regarding state law claims.

2. Whether this Supreme Court has jurisdiction where the petitioner has previously stated in open court that he is *withdrawing* his pending petition on the Court of Appeal denial of writ of mandate regarding orders determining good faith settlement pursuant to California Code of Civil Procedure section 877.6, which petition he is now seeking to pursue by writ of certiorari to this Court.

3. Whether the state trial court acted within its discretion in granting an order shortening time for notice of the good faith determination hearing, which order shortening time was not objected to by petitioner.

4. Whether a state trial court properly refused to continue a hearing to determine the good faith of settlements pursuant to C.C.P. § 877 and § 877.6, when the petitioner requested such continuance in order to conduct discovery on the issue, where petitioner did not request continuance or discovery until the morning of the hearing, did not present a discovery at the plan hearing, and had prior opportunity to conduct such discovery, and where the trial court had sufficient evidence before it to make a determination.

5. Whether petitioner can attack the good faith of the settlements, where that issue is raised for the very first time in the petition for writ of certiorari to the U.S. Supreme Court.

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Real Parties in Interest.

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Additional Real Party in Interest.

II

JURISDICTIONAL QUESTION

Petitioner erroneously seeks to invoke jurisdiction of this Court pursuant to 28 U.S.C. section 1257(3), which has been actually amended to 28 U.S.C. section 1257(a) providing that final judgments or decrees of the highest court of a State may be reviewed by the U.S. Supreme Court by writ of certiorari:

> . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioner seeks writ of certiorari for review of a California Court of Appeal decision denying his petition for writ of mandate, and not the decree of the highest court of the State. It is the position of the individual settling plaintiffs as real parties in interest that this matter is not within the jurisdictional bounds of this U.S. Supreme Court. Rather, the case strictly involves state court interpretation of its own state law.

For this Court to grant a writ for certiorari, the issues presented must involve a *substantial* federal question. *Angel v. Bullington*, 330 U.S. 183 (1947). Further, the substantial federal question must be raised in a timely and proper manner in the state courts. Timeliness is generally determined according to state procedural law and failure to raise such question when required by state statute will preclude review (*Edelman v. California*, 233 U.S. 357 (1953)), unless the state rule does not give the appellant a fair opportunity to raise the question or if the rule appears to evade the federal question decision. *National Mut. Building & Loan Ass'n. v. Braham*, 193 U.S. 635 (1904).

State courts have been traditionally viewed as the appropriate forum to make the final determination on questions of state law. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). Review is not available if the decision of the state court was based exclusively on state law. *McCoy v. Shaw*, 77 U.S. 302 (1928). This Court restated this view in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945), as follows: "[T]his Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."

The California Court of Appeal, First Appellate District, denied without opinion the subject petition for writ of mandate.

Subsequently, the California Supreme Court denied without opinion petitioner's review of the decision of the Court of Appeal. Therefore, we must look to the basis for the trial court's decisions in this matter.

A review of such decisions, which are included in petitioner's appendix, clearly reflect that they are based exclusively on state law. The state court's orders are based upon both state statutory and judicial authority, including California Code of Civil Procedure sections 877 and 877.6, which provide for settlement between less than all parties in an action, and *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488 (1985), which established the criteria for determining the "good faith" of such settlements.

This Court has also ruled on its jurisdiction to review cases which include both federal and state questions. In the landmark case of *Murdock v. Memphis*, 22 L.Ed. 429 (1875), this Court stated that it would not review a state decision if that decision was based upon adequate state grounds and that even though a case may contain a federal question, the Court will not grant review if there is an adequate state ground supporting the state court decision. Therefore, even though petitioner vaguely raised the possibility of a deprivation of a Constitutional property right, settling plaintiffs and real parties in interest contend that the decisions from which petitioner seeks review were founded on adequate state grounds, as set forth above.

It is clear that petitioner's petition for writ of certiorari does not meet the jurisdictional criteria for granting the petition nor to invoke the attention of this federal body.

III

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND OF THE UNDERLYING ACTIONS

Technical Equities Corporation did business in San Jose, California starting in 1969. Technical Equities held itself out as a company which could provide complete financial planning and

portfolio management, as well as management of operating companies. Over its 16 year history, according to its audited financial statements, T.E. increased its assets and profits annually, and its common stock, which was later traded on the NASDAQ system, continued to climb in value.

In fact, Technical Equities was a fraudulent financial scheme, particularly preying upon individuals who had money but little time for or knowledge of financial management of those funds, such as widows, orphans, doctors, professional athletes, and the elderly. Over the years, *hundreds* of people throughout the United States invested their life savings in Technical Equities. On February 7, 1986, Technical Equities filed for protection under Chapter 11 of the Bankruptcy Code, leaving its investors with out-of-pocket losses of approximately $150 million.

Plaintiffs' counsel herein represent the vast majority of T.E. investors who suffered financial and emotional losses arising from the financial fraud which was Technical Equities. The hundreds of actions filed by these individual plaintiffs were all coordinated as one action, in Santa Clara County Superior Court, before one judge, the Honorable Conrad L. Rushing.

Seven test cases were set for trial commencing on March 31, 1988. During the first two weeks of trial, prior to opening statements, many of named defendants entered into settlements with these hundreds of plaintiffs. The settlements included cash payments by the following defendants:

$25 million from Security Pacific National Bank, the primary banker for T.E.;

$17.9 million from KMG Main Hurdman, the auditor of T.E. financials;

$10.8 million from Bear, Stearns & Company, the market maker for T.E. common stock;

$4 million from Bank of the West, another financial affiliate of T.E.;

$900,000 from Ernest de la Ossa, a T.E. consultant, a T.E. director and a director of Bank of the West; and

$668,576.70 from Kouns, Marshall, Quinlivan & Severson, the attorneys for T.E.

Other settling defendants are officers and directors of Technical Equities, who have agreed to the entry of judgments against them based upon the findings of the jury regarding T.E. investors' out-of-pocket losses, and the assignment of rights as to insurance policies providing coverage to said defendants. There were *no* sliding scale settlements.

These settlements were twice determined to be in good faith, at two separate hearings pursuant to C.C.P. § 877.6 and the standards set forth in California case law. Several of these settlements were contingent upon the finality of the § 877.6 determination, prior to distribution to the injured plaintiffs.

Petitioner Russo is a defendant in Phase II of the T.E. litigation. There were 31 defendants named in Phase I of the litigation, which culminated in these settlements and in trial. In 1988, 20 new defendants were added as Does defendants—which is Phase II of the T.E. litigation, set for trial on October 3, 1988.

On the first day of trial, the parties entered into a stipulation regarding trial. Pursuant to that stipulation, plaintiffs and petitioner waived the right to a jury, waived the right to findings, and waived the right to appeal. The parties also stipulated that the trial court could take judicial notice of all evidence previously presented in the Technical Equities coordinated proceeding. Plaintiffs also dismissed their intentional tort claims against petitioner as well as claims for punitive damages.

At the hearing of October 3, 1989, as part of the stipulation regarding waiver of appeal, *petitioner specifically withdrew his pending petition for review to the California Supreme Court of the denial of petition for writ of mandate by the California Court of Appeal*—the specific matter which petitioner now attempts to have revived before this Court.

At the conclusion of the month-long Phase II court trial, judgment was entered in favor of settling plaintiffs against petitioner Russo for investor losses and emotional distress damages.

B. CHRONOLOGY OF EVENTS REGARDING THE UNDERLYING ORDERS

1. Phase I Of The T.E. Litigation And The First Good Faith Determination Hearing

The first phase of the T.E. litigation culminated with the trial of seven T.E. cases involving elderly plaintiffs. This trial was scheduled on an expedited basis pursuant to C.C.P. § 36(a), commencing on March 31, 1988, and finally concluding on June 29, 1988.

During the first two weeks of trial, the majority of defendants entered into settlements with the trial plaintiffs *and hundreds* of other T.E. investor plaintiffs who had brought actions which were a part of the T.E. Coordinated Proceeding. These settlements totalled approximately *$60 million* in cash, and in addition included assignment of rights to insurance coverage, and in some instances the entry of judgments based upon the verdict ultimately rendered by the jury in the test trial. *None* of these were sliding-scale settlements. The remaining seven Phase I defendants—six T.E. officers and a related general partnership—proceeded to conclusion of trial.

In utilizing a test case procedure, plaintiffs' counsel had filed hundreds of actions on behalf of individual T.E. investors, but had only served the few test actions for similicity of procedure. After the test cases had been set for trial, on or about March 4, 1988, a few elderly plaintiffs amended their complaints to substitute in several new defendants as Does, in anticipation of a second phase of test cases. Thereafter, the Court orally ordered at its hearing on March 18, 1988 that all plaintiffs to all actions which are a part of the T.E. Coordinated Proceeding should commence service of all of their actions on all defendants by May 1, 1988.

Because plaintiffs' counsel were still in trial and because plaintiffs' requested leave to amend their hundreds of complaints to add new defendants as Phase II Does and refine the pleadings, the Court entered an Order on April 27, 1988, amending its oral order such that all complaints were to be filed and service commenced by June 1, 1988 rather than May 1, 1988. On June 2, 1988, the Court by minute order extended the time from June 1, 1988 to June 10, 1988.

Apparently because his newly acquired client had not been substituted into the few new test cases as a Doe, counsel for Stephen Russo, a former T.E. Assistant Controller, frequently attended the trial and actively solicited plaintiffs' counsel to name his client as a defendant when the hundreds of complaints were amended. Indeed, Russo's counsel sent a letter dated April 27, 1988 to plaintiffs' counsel with instructions regarding service of process on Russo. In response to plaintiffs' counsel's questioning of such approaches, Russo's counsel sent an explanatory letter dated May 13, 1988 to plaintiffs' counsel. These communications and the frequent appearances of Russo's counsel at trial proceedings occurred *prior* to the noticing of the § 877.6 hearings.

After granting the parties' request for an order shortening time to determine whether the several settlements between plaintiffs and defendants were in good faith, pursuant to C.C.P. § 877 and § 877.6, duly noticed motions were heard on May 18, 1988 and May 25, 1988. Appropriate briefs were filed by all parties, including declarations in support of a finding of good faith. There being no formal opposition, the Court granted all of the motions determining the settlements to be in good faith. Notice of Entry of Omnibus Order and Omnibus Order Approving Settlements was entered on May 31, 1988 and sent to all parties to the T.E. Coordinated Proceeding. No writ was filed contesting these good faith determinations during the statutory time period.

Prior to the amending of the complaints, plaintiffs' counsel made a determination as to which additional persons and entities had responsibility for the losses sustained by the hundreds of T.E. investors. Hundreds of individual T.E. investor plaintiffs amended their complaints and served the defendants who had not settled and the new Doe defendants—the so-called Phase II defendant—which now included Stephen Russo. These complaints were served on June 10, 1988, in accordance with court order.

Final verdict in the test case trial was rendered on June 29, 1988. Thereafter, the trial court set post-trial motions for hearing on July 28, 1988.

2. Phase II Of The T.E. Litigation, When Petitioner Russo Had Over 30 Days To Take Discovery If Necessary On The Issues Regarding Settlement

After the conclusion of trial, the Court scheduled weekly status conferences regarding the remaining T.E. actions. Petitioner Russo, who had been served on June 10, 1988, was made formally aware of these status conferences, and of the prior settlements. (As a matter of fact, Russo's counsel had been aware of the status of settlements and trial, which he personally attended, since well before sending his letter of April 27, 1988.) At the first of these status conferences, on July 13, 1988, the attorney sent from the offices of defense counsel for Russo told the Court that he had never met his client and did not even know what his position was with Technical Equities.

At the status conference on July 20, 1988, the settling defendants requested an order shortening time for another good faith determination hearing because of the addition of new defendants in the action. *There being no opposition to the request*, the Court granted the order shortening time, and set the good faith determination hearing for July 27, 1988. Defense counsel for Russo was present at the hearing on July 20, 1988 and *voiced no opposition.* Settling defendants were ordered to serve their renewed motions by July 22, 1988 on all parties, which they did.

No parties, including Russo, noticed discovery regarding the good faith of the settlements, although plaintiffs' counsel specifically made themselves available for discovery should any defendant have requested. *On the morning of this second good faith determination hearing*, petitioner Russo filed an "objection". This objection *did not contest that the settlements had been entered into in good faith* nor did it present a discovery plan. *Russo presented no declarations* contesting the good faith of the settlements achieved, to counter the many declarations filed by the plaintiffs' counsel and settling defense counsel. Rather, the Russo objection *raised for the first time on the day of the hearing that the matter was being heard on shortened time*, and that the hearing should be continued for an undefined period of time so that petitioner could *work on* formulating a discovery plan and then noticing and taking discovery. In the meantime, the settle-

ment of hundreds of T.E. investor actions, including many elderly people who lost their life savings, would have to wait.

The Court, concluding that it had been presented with more than sufficient evidence regarding the culpability of the defendants, evidence regarding the available insurance coverage of the settling defendants, and the good faith of the settlements, and *no* evidence to the contrary, determined again that the settlements had been entered into in good faith.

Thereafter, as a result of the post-trial motion hearing on July 28, 1988, an Amended Judgment was entered on August 3, 1988, as to the test trial cases.

Test trial against the new defendants, including petitioner Russo, was set for October 3, 1988. That month-long trial concluded with judgments being entered in favor of the settling plaintiffs and real parties in interest against petitioner Russo.

IV
REASONS REVIEW SHOULD BE DENIED

A. PETITIONER PREVIOUSLY WITHDREW HIS PETITION FOR REVIEW

On the first day of trial, the parties herein entered into a stipulation regarding trial, including waiver of appeal. On the record of that proceeding, petitioner specifically withdrew his petition for review on this very matter (which at the time was pending before the California Supreme Court).

Accordingly, the matter presented by this petition for writ of certiorari is *moot* as the prior petition for review was withdrawn by petitioner.

B. THE COURT'S DETERMINATION THAT THE SETTLEMENTS WERE ENTERED INTO IN GOOD FAITH WAS WELL-REASONED, WITHIN ITS DISCRETION, AND ADEQUATELY NOTICED

At the trial court hearings, and by his petitions to the California Appellate Courts, petitioner Russo *did not* ask the courts to overturn the trial court's determination that the settlements

herein were entered into in good faith. Rather, petitioner Russo brought a petition for writ of mandate on the grounds that the trial court abused its discretion in scheduling the good faith hearing on shortened time and in not continuing the hearing until petitioner Russo could formulate a discovery plan and take discovery on *Tech-Bilt* issues.

1. The Court Was Within Its Discretion In Granting An Order Shortening Time For Notice Of The Good Faith Determination Hearing, Which Order Shortening Time Was Not Objected To By Petitioner Russo

California Code of Civil Procedure section 877.6(a) provides that a hearing on determination of good faith of settlements is ordinarily noticed at least 20 days prior to the hearing. Herein, all parties were orally notified of the second good faith determination hearing on 7 days notice, and received five days written notice, as the Court had granted an order shortening time.

As set forth above, petitioner Russo *did not object* at the hearing when the request for shortened time was made and granted. Indeed, petitioner Russo did not object to the timing of the hearing until the very morning of the hearing itself.

As to the shortening of notice, C.C.P. § 877.6 provides in pertinent part:

> Upon a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue to be made before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced.

The shortening of the notice period was within the discretion of the trial court. The first good faith hearing was held on shortened time prior to verdict, and the second good faith hearing was held on shortened time prior to entry of the amended judgment.

Accordingly, the granting of the order shortening time for the good faith determination hearing was appropriately within the discretion of the trial court, and was *not opposed or objected to by defendant Russo at the time the order shortening time was granted.*

2. The Court Acted Within Its Discretion In Refusing To Continue The Good Faith Hearing Upon Petitioner Russo's Request To Take Undefined Discovery

Petitioner Russo relies upon the decision in *Singer Co. v. Superior Court*, 179 Cal.App.3d 875 (1986), in contending that the trial court abused its discretion in refusing to continue the second good faith determination hearing in order for defendant to formulate a discovery plan to elicit information relevant to the factors to be weighed by the trial court as set forth in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates, supra*, 38 Cal.3d 488.

However, *Singer* is *not contrary* to the procedures and actions taken by the trial court herein. *Singer* was a pioneer case in holding that a non-party tortfeasor, who was not a party to an action at the time the good faith determination was made as to a settling defendant, "must be afforded notice and an opportunity for a hearing" before that tortfeasor's rights to indemnity and contribution against the settling defendant can be barred under C.C.P. § 877.6. In this T.E. coordinated proceeding, petitioner Russo *did* have the opportunity of notice and a hearing on the good faith determination after Russo was named as a defendant in this action.

Singer also held that a party *contesting* the good faith determination has the burden of proving lack of good faith, and should be afforded the opportunity of discovering information relevant to the *Tech-Bilt* factors, so that the trial court can make an informed determination. *Singer*, at 895.

Here, petitioner Russo did *not* contest the determination that the settlements were in good faith. At the trial court level and in all of his California appellate briefs, petitioner Russo has only complained that he did not have a sufficient opportunity to gather information through discovery in order to present evidence regarding the *Tech-Bilt* factors. Petitioner Russo is confused, in that a tortfeasor's right to limited discovery from settling defendants regarding *Tech-Bilt* factors *does not arise unless and until the tortfeasor has asserted a lack of good faith.*

In his petition for writ of certiorari to this Court, *petitioner raises for the very first time* his contention that the settlements

were not in good faith. In support of this new contention, petitioner only discusses the settlement with KMG Main Hurdman, the auditor for Technical Equities, which settlement for $17.9 million was a record-breaking amount in investor fraud actions.

Defendant Russo has never previously asserted that the settlements were not entered into in good faith. Rather, the "objection" filed the day of the hearing requesting a continuance in order to formulate a discovery plan was nothing more than a thinly veiled attempt to create delay, as the trial against petitioner Russo was set to commence October 3, 1988. There is no assertion in his "objection" that there is a lack of good faith, but rather petitioner proposes a "fishing expedition" without any basis in fact. As petitioner did not allege that the settlements were in bad faith, there was no right to discovery.

Even if the "objection" is viewed as a tacit opposition to the good faith determination itself, petitioner Russo was afforded the opportunity to gather sufficient information through discovery prior to the second good faith determination hearing.

The circumstances in the *Singer* case do not vitiate the result of the exercise of the trial court's discretion here. In *Singer*, the plaintiffs brought a wrongful death action arising from the fire death of two children. Damages for the actions were estimated to be $252,000 and $500,000 respectively. Defendant Cool-Temp settled each of the two cases for only $5,000.

Later, Singer was brought into the litigation as a cross-defendant in a cross-complaint filed by other defendants in January 1985. After filing and serving an answer and a cross-complaint for indemnity and contribution against Cool-Temp and others on March 1, 1985, Singer promptly served two sets of interrogatories and three requests for production of documents on Cool-Temp on March 25, 1985 seeking discovery of evidence relevant to those factors identified in *Tech-Bilt. Singer,* at 882.

Thereafter, Cool-Temp brought a motion to dismiss the Singer cross-complaint on the grounds of C.C.P. § 877 and 877.6. Cool-Temp refused to comply with and respond to the discovery propounded by Singer regarding the factors relevant to a good

faith determination. Despite Singer's request for a continuance of the motion to dismiss until after the motion to compel discovery, the trial court refused to continue the hearing.

In this T.E. Coordinated Proceeding, petitioner Russo made no attempt to propound discovery relevant to *Tech-Bilt* factors. In fact, petitioner Russo had no discovery proposal for the court to even consider when he raised *for the first time* at the good faith hearing his desire to propound discovery.

The *Tech-Bilt* factors for which discovery might be appropriate are:

> (1) A rough approximation of plaintiffs' total recovery;
>
> (2) Settlor's proportionate liability;
>
> (3) The amount paid in settlement;
>
> (4) The allocation of settlement proceeds among plaintiffs;
>
> (5) Recognition that a settlor should pay less in settlement than he would if he were found liable after a trial;
>
> (6) Financial conditions and insurance policy limits of settling defendants; and
>
> (7) The existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants.

Singer, at 895, citing *Tech-Bilt*, at 499; *see also City of Grand Terrace v. Superior Court*, 192 Cal.App.3d 1251, 1260 (1987).

Prior to the second good faith determination hearing, *defendant Russo was given the opportunity to have access to information regarding all of the above Tech-Bilt factors.* As a part of previous discovery which was accessible to all parties to the T.E. actions, including petitioner Russo, the report of Brooks, Stednitz & Rhodes, an independent accountancy firm acting as plaintiffs' expert witness, reflected the out-of-pocket losses of each of the hundreds of settling plaintiffs. The trial court had previously ordered that any party to the T.E. Coordinated Proceeding who made the request must be given information regarding the terms of each of the settlements, including the amount to be paid in

settlement. Plaintiffs' counsel has previously disclosed as a part of the public record that the settlement funds would be allocated to all of the individual settling plaintiffs on a pro rata basis, based upon the verified damages set forth in the Brooks, Stednitz & Rhodes report. Defendant Russo also had full access to information regarding settlors' proportionate liability, as he had full access to all of the discovery in the litigation, including but not limited to the trial transcripts and trial exhibits.

The trial court, in determining that the settlements were in good faith as to petitioner Russo, had a comprehensive amount of evidence and information at its disposal. Judge Conrad Rushing, acting as the Technical Equities Coordination Trial Judge, had been the sole judge handling these hundreds of coordinated actions since coordination was granted in Summer of 1986. That trial court had been privy to the many motions for summary judgment and summary adjudication, reviewing hundreds of pages of depositions and hundreds of documents produced in the litigation regarding the settling defendants. The trial court had recently concluded presiding over a three-month "super trial", for which a courtroom was specially constructed, consisting of hundreds of hours of testimony and hundreds of trial exhibits, further revealing information regarding the liability of the named defendants, including settling defendants.

The trial court had requested and had access to information regarding all of the insurance policy limits potentially providing coverage to the settling defendants. The trial court also met with the two Settlement Special Masters in making his determination that there was no collusion, fraud or tortious conduct between the settling parties.

The trial court's conclusion that further discovery would not shed further light in making his determination regarding the good faith of the settlements pursuant to the *Tech-Bilt* factors was well-reasoned and within the court's discretion. There was "a sufficient evidentiary basis to enable the court to consider and evaluate the various aspects of the settlement." *City of Grand Terrace v. Superior Court, supra* at 1263.

Absent a finding that the trial court abused its discretion, the determination of good faith cannot now be set aside. *Singer*, at 895.

V

CONCLUSION

For all of the foregoing reasons, settling plaintiffs, as real parties in interest, pray that the petition for writ of certiorari be denied.

DATED: February 27, 1989

Respectfully submitted,

COTCHETT & ILLSTON

By JOSEPH W. COTCHETT
Attorneys for Hundreds of Settling Plaintiffs, and Real Parties in Interest

(Appendix follows)

APPENDIX

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

COURTROOM NUMBER 100

BEFORE THE HONORABLE CONRAD L. RUSHING,
JUDGE

COORDINATED PROCEEDING,	COORDINATED PROCEEDING
SPECIAL TITLE (RULE 1550(B))	MASTER FILE NUMBER 1991
TECHNICAL EQUITIES CASE	SANTA CLARA COUNTY
	SUPERIOR NO. 600306

FIRST DAY

OCTOBER 3, 1988

Santa Clara, California October 3, 1988

Morning Session

Proceedings

The Court: Counsel, good morning.

Mr. Ruby: Good morning.

The Court: This is the coordinated technical equities case set for jury trial this morning.

Mr. Ruby, you are at the podium, you may proceed.

Mr. Ruby: For the record, Allen Ruby appearing on behalf of the plaintiffs. And we have a stipulation to announce to the Court.

As respects the plaintiffs litigation group, plaintiffs and defendant Stephen Russo, whose case is set for jury trial this morning, I am reciting this stipulation on behalf of all plaintiffs represented by the plaintiffs litigation group. And in particular the law firms of me, Tom Anderson, Cotchett and Illston, the Garvic law firm, Lanzone law firm, Crosby law firm and Rappaport law firm.

And the plaintiffs who are covered by this stipulation are further identified in Exhibit A. through G. or perhaps the Court's Exhibit A. through G. in the court trial that concluded the proceedings as to four of the defendants several weeks ago.

The stipulation is as follows: The plaintiffs and defendant Russo stipulate to waive jury. In return for a waiver of jury trial the parties waive their right to findings, memorandum of decision or such other findings from the Court is no longer required. And the parties also mutually waive their right to appeal from any judgment of the Court.

The court trial will be on behalf of all the plaintiffs, all of the several hundred plaintiffs represented by the law firms identified previously.

The plaintiffs, as part of this stipulation, will dismiss without prejudice their fraud and other intentional tort claims. Any claims involving malice or oppression will be dismissed from the proceedings to be heard by the court in this court trial.

It is further stipulated by the parties that the Court may, in rendering judgment in this court trial, fully consider and take into account all evidence submitted at the jury trial which was presided over by this Court previously.

Defendant Russo reserves his right to claim that certain evidence may or may not be meaningful as to his client as anyone has in any trial, but admissibility of all the evidence from the jury trial is established by stipulation of the parties.

This is the entire stipulation and the entire agreement before the Court and the entire agreement.

I have now recited everything that is the subject of the stipulation or agreement or understanding between the parties and we affirmatively represent that to the Court. And that's the stipulation we tender.

Mr. Harrison: Could I talk to Mr. Ruby? I think there may have been a misstatement.

Mr. Ruby: Your honor, it's been pointed out to me that I misspoke. The fraud claims and other intentional tort claims that we dismissed as part of the stipulation will be dismissed with prejudice. Apparently I said without prejudice and that was erroneous. So those fraud claims will be dismissed with prejudice.

Mr. Harrison: That's fine. Jeff B. Harrison. I apologize for walking around disturbing the Court when Mr. Ruby was reciting that, but I picked up on that and it had me concerned, your honor.

The Court: Yes. Is that your stipulation?

Mr. Harrison: That is my stipulation. But further, your honor, Mr. Russo is present and the Court would want to inquire as to his understanding and willingness and agreement with that stipulation. If I could have him come forward?

The Court: You may, yes.

Mr. Harrison: Steve. Your honor, this is Steven J. Russo, my client. This is his honor Judge Rushing.

The Court: Mr. Russo, good morning.

Mr. Russo, did you hear the stipulation that was offered on the record by Mr. Ruby?

Mr. Russo: Yes, I did, sir.

The Court: Were you able to understand it?

Mr. Russo: I did understand it.

The Court: Have you had a chance to talk it over with your attorney?

Mr. Russo: I have talked it over with counsel, discussed it and in complete agreement.

The Court: Did I hear you are in complete agreement with it?

Mr. Russo: Yes, sir.

The Court: Therefore you do accept it?

Mr. Russo: Yes, I do, sir.

The Court: And Mr. Harrison, on his behalf you do accept it as well?

Mr. Harrison: Yes, your honor, I do.

The Court: Very well. The court will accept it, then.

Mr. Harrison: The one remaining matter that we just didn't resolve in chambers was the timing. Do we work it out amongst ourselves for his deposition?

Mr. Ruby: We have agreed that if the plaintiffs want to take Mr. Russo's deposition, Mr. Harrison will make him available at our reasonable—office of our choosing tomorrow afternoon. We will notify Mr. Harrison before the end of the day whether in fact we do which to depose Mr. Russo.

The Court: Is that right, counsel?

Mr. Harrison: Yes, yes, your honor.

The Court: All right.

Mr. Ruby: If I may, your honor, just so, in an abundance of care, I'd like to restate again and ask for Mr. Harrison's concurrence, that the stipulation which we have now placed on the

record represents the entire stipulation between the parties and there are no other terms and conditions other than what has been recited on the record in open court today.

Mr. Harrison: That is absolutely correct. There are no terms, conditions, promises, representations, warranties of any type.

The Court: Very good.

Mr. Cotchett: On behalf of the Cotchett, Rappaport, Garvic and the Lanzone law firms, we personally waive the appeal as set forth in the prior stipulation.

The Court: All right.

Now, this personal waiver of appeal, Mr. Russo, do you waive any rights of appeal that you have from this case? Mr. Harrison and Mr. Russo, I think you can do it, Mr. Harrison?

Mr. Harrison: We have done so. I thought that was part of the stipulation. And acturally included within that, as the court knows, is a, there was a pending petition on a denial of a writ on the 877.6 good faith hearing from May of '88.

The Court: Yes.

Mr. Harrison: That was denied but I did file a petition for review with the Supreme Court which is pending. It has not been denied. So that I have to assume as part and parcel of that is a withdrawal?

The Court: Well, that is not a right of appeal from a judgment, actually that's a writ proceeding. But I take it that that writ proceeding, whatever it is, and I am not familiar with it, but is that withdrawn?

Mr. Harrison: Let me talk to my appellate lawyer here. It may have been denied. So, there was petition for a stay that got denied. So may be moot. It is not an important issue, I don't believe. I am not going to—

The Court: Well, the point is—all right.

Mr. Harrison: A moot thing, red herring.

The Court: Mr. Trussell?

Mr. Trussell: On behalf of the clients represented by the Anderson firm, we also now personally waive our appellate rights in accordance with the stipulation explained by Mr. Ruby.

The Court: All right. Very good. Anything else?

All right these cases will be set down for trial Wednesday, October 5th at 9:30. The plaintiffs are to have to me by 4:00 o'clock October 4th a trial brief. It need not be extensive.

Anything further now? All right. Thank you, counsel, you are all excused until October 5th at 9:30.